CRIMINAL APPEAL NO. 757 OF 1988.

Date of decision: 27.2.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr. S.A. Pandya, advocate for the appellant.
Mr. K.P. Raval, A.P.P. for respondent-State.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

February 27, 1996.

Oral judgment (Per Jain, J.)

The fateful incident took place on 27.3.1986 at about 11 A.M. taking life of minor Sukabhai Ambalal, aged about 8 years. According to prosecution case, the deceased minor had gone to take biscuits and while returning the accused saw him on the way. The accused demanded biscuits but the minor refused to give. The accused enraged by negative reply assaulted the deceased with "tavetha" (a spade type instrument with long handle used for cooking and changing sides of cake). As alleged, the deceased

was assaulted with pointed portion giving blows in stomach (abdominal portion), loin and right thigh. After injuring the minor, the body of the injured was thrown into a nearby well. On hearing commotion, the complainant- father of the deceased and three others came on the spot and managed for taking out the body of the deceased from the well. With this set of facts, the accused was charged and tried for commission of offence under Section 302 of IPC by the learned Additional Sessions Judge, Bharuch. The learned Judge having found favour with the case of prosecution, convicted the accused/appellant for offence under Section 302 of IPC and sentenced to undergo rigorous imprisonment for life vide his judgment and order dated 30.8.1988. Aggrieved by the order of conviction and sentence, the accused/appellant has preferred this appeal.

The learned advocate Mr. Satish A. Pandya for the appellant has assailed the judgment on following points:

1. That the conviction is based on the testimony of sole eye witness Kashmiben, P.W.3.
2. The evidence of complainant is inconsistent and is not trustworthy.
3. That the accused was suffering from insanity and thereby claims protection under Section 84 of IPC.

The sole ocular witness, Kashmiben, was examined as P.W.3, at Ex.19. There is nothing on record that she is either interested or related witness which may caution us from weighing her testimony with great care and caution. We have also not come across any such proposition of law which provides that conviction cannot be based on the testimony of sole eye witness, if otherwise the witness is trustworthy and reliable. The presence of this witness is natural and, therefore, nothing can be said about her being a chance witness. According to her, she had gone to fetch water from the outskirts of the village and while returning she saw deceased Sukabhai proceeding towards his residence with biscuits. It is at that moment that the accused caught hold of the deceased Sukabhai and assaulted him with tavetha. She has categorically stated that the accused had given blows one at stomach, another at loin and third at thigh portion and thereafter the body of the injured was thrown into the well. On seeing this, she shouted calling for the father of deceased. On hearing her shouts, the complainant- father of deceased and his wife, came there. Three other persons named Chandu Nanji, Punia Devla and Maruji Deva also came there and they fished out the body

from the well. Till this event the witness was present and it is only thereafter that she went inside her house. She has admitted that after seeing the body being fished from the well she went away and is unaware about anything beyond that. Relying upon this statement, Mr. Pandya, learned advocate for the appellant, has argued that the witness cannot be treated as an eye witness. But in our view, this argument is misplaced and misconstrued as a particular statement in isolation and divorced from the rest of the evidence is relied by him. This is not permissible in law. As a rule of interpretation, a document or evidence has to be read as a whole and individual sentence cannot be separated or isolated or read as divorced from other context. She was cross-examined at length but we say that she stood firm and was not shaken at all. Her presence was also not challenged. The only suggestion regarding insanity of accused was made in cross and the same also came to be turned down emphatically. Since natural presence of this witness is not under challenge and otherwise her testimony is reliable and trustworthy, we have no reason to disbelieve and discard her testimony. Version given by this witness being true and correct, inspire confidence especially when she is neither related nor interested in the complainant or is inimical to the accused. In such set of facts, in no uncertain terms we say that P.W.3, Kashmiben, is an independent witness, is reliable, credible and trustworthy. Her evidence does not suffer from any infirmity and can be relied as cogent and concrete piece of evidence for basing conviction.

Mr. Pandya, the learned advocate for the appellant, has argued that the oral testimony of the complainant is inconsistent with that of FIR, Ex.31, and therefore, shakes its trustworthiness and shall not be relied upon. The complainant- father of the deceased- has been examined as P.W.2, Ex.18 and the F.I.R. is produced at Ex.31. It is needless to say that FIR is not a substantive piece of evidence and can only be used for contradictions. In his oral testimony the complainant has adhered to what he has stated in the FIR, Ex.31, with regard to actual occurrence or how he came to know. According to him, on hearing shouts of P.W.3, Kashmiben, he came out of his house and went to the spot only to find the body of his deceased son having been thrown into the well. We find some minor inconsistencies and contradictions in between the FIR and his oral testimony. But, such minor inconsistencies are not very much relevant with regard to actual occurrence of incident, namely, involvement of the accused and the manner in which the incident occurred and, therefore, much

significance to such inconsistencies or contradictions cannot be attributed so as to weaken the case of prosecution. As stated in the FIR, on hearing commotion, he came out of his house and at that time he heard Somabhai saying that his son-the deceased- had been thrown into the well. Of course, in oral testimony he does not refer to the name of Somabhai but he does say that he came out of his house hearing shouts from local residents saying that the body of his son- deceased Sukabhai- has been thrown into the well. In our view, if at one place the witness refers to the name and if at another place he refers to local residents, much significance should not be attributed to such discrepancy especially when such named person is from the same locality. Witness is not expected to have photographic memory after lapse of some years when he comes before the Court for deposition and, therefore, even if in his oral testimony omits name but refers by some other mode aiming at same person, we do not find as material discrepancy which may adversely affect the prosecution. Technically we may say that this is not at all a discrepancy but for the sake of argument even if it is treated as a discrepancy then it is not material because at one place the witness refers by name and at another place the presence of such a person is referred in general as resident of locality.

Similarly, Mr. Pandya has also invited our attention to the testimony of P.W.3, Kashmiben, wherein we find some contradictions with regard to some event alleged to have taken place preceding the actual occurrence. In her police statement she did say that the accused first demanded biscuits and then assaulted but in oral testimony she does not say so. True, this is an omission but not at all relevant and does not go to the root of the merits of the case as nothing to do with the actual assault, involvement of accused and throwing the body in well. The testimony of this witness is consistent when she says that at the relevant time she saw deceased coming with biscuits and was caught hold by the accused. In our view, this is no more a contradiction but a different mode of expressing the event and after lapse of 2 1/2 years when one cannot be expected to give videographic memory and, therefore, cannot be said to be material contradiction so as to weigh the Court to discard her evidence.

The trump card of defence as advanced by Mr. Pandya is with regard to insanity of the accused. According to Mr. Pandya, the accused was having periodical attacks of insanity and at the relevant time also was under attack

of insanity and, therefore, was not able to judge as to what he was doing and claims benefit under Section 84 of IPC. As argued by Mr. Pandya, the learned advocate for the appellant, apart from proving the case of prosecution beyond reasonable doubt it is incumbent upon the prosecution even to prove the mens rea and in absence thereof the benefit must go to the accused. In support of his submission he relies upon decision of the Supreme Court in the case of Dahyabhai v. State of Gujarat, reported in 1964 GLR, 911 = AIR 1964 SC 1563. On this point Mr. Raval, learned A.P.P., has also drawn our attention to a judgment in the case of Bhikari v. State of U.P. reported in AIR 1966 SC 1, wherein also Dahyabhai's case (supra) was referred to and explained. In para 5 of this judgment, the Supreme Court has observed as under:

> ".....There is no doubt that the burden of proving an offence is always on the prosecution and that it never shifts. It would, therefore, be correct to say that intention, when it is an essential ingredient of an offence, has also to be established by the prosecution. But the state of mind of a person can ordinarily only be inferred from circumstances. Thus if a person deliberately strikes another with a deadly weapon, which according to the common experience of man-kind is likely to cause an injury and sometimes even a fatal injury depending upon the quality of the weapon and the part of the body on which it is struck, it would be reasonable to infer that what the accused did was accompanied by the intention to cause a kind of injury which in fact resulted from the act. In such a case the prosecution must be deemed to have discharged the burden which rested upon it to establish an essential ingredient of the offence, namely the intention of the accused inflicting a blow with a deadly weapon. Section 84 of the Indian Penal Code can no doubt be invoked by a person for nullifying the evidence adduced by the prosecution by establishing that he was at the relevant time incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. Now it is not for the prosecution to establish that a person who strikes another with a deadly weapon was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. Every one is presumed to know the natural consequences of his act.

> Similarly every one is also presumed to know the law. There are no facts which the proposition has to establish. It is for this reason that S.105 of the Evidence Act places upon the accused person the burden of proving the exception upon which he relies........"

We stand fortified in our view to say that as per above observations of the Apex Court the prosecution has discharged its burden of proving the case including the intention of causing death. In this case, the accused assaulted a small child of 8 years with pointed edge of tavetha and then threw the body in well. Causing injuries with pointed portion of an instrument like tavetha to a small child aged about 8 years and then throwing the body into well is nothing else but a live example of inferring knowledge and intention of the accused. In our view, the prosecution has proved the same by cogent and concrete evidence and, therefore, now, if the accused wants to take benefit of Section 84 of IPC, the burden lies upon the accused to prove it by cogent and concrete evidence. Mr. Pandya has also relied upon decision of this court in the case of Ramilaben v. State of Gujarat, reported in 1990 GLR 1202. As regards the principle of law enunciated, we are in respectful agreement but on facts cannot be made applicable to the facts of this case and, therefore, is no application. Of course, every prosecution witness was confronted with the suggestion that the accused was having periodical attacks of insanity and was also known as insane person amongst villagers but every prosecution witness has denied the same. In order to discharge the burden, the defence has examined two witnesses at Ex.35 and Ex. 37. Defence witness No.1, Ex.35, is none else but the father of the accused who is related and highly interested witness. He has stated about temporary phase of insanity. His testimony sans medical evidence. In his testimony he has categorically referred to treatment for insanity in one dispensary at Maroli but no doctor has been examined or case papers from Maroli dispensary have been brought on record. Though it was so declared by the accused in his further statement under Section 313 of Cr.P.C. Defence witness No.2, Somabhai Jethabhai is examined at Ex.37. He has simpliciter said that the accused is insane since last more than six years. But he does not refer to temporary and periodical insanity as has been referred to by the defence witness No.1, father of the accused. In view of this fact, we find material contradiction and inconsistency between the oral testimony of both witnesses examined in defence. One refers to temporary and periodical insanity even in

present while the other refers to total insanityonly in past. The said evidence is not corroborated by any other independent or medical evidence though was available and, therefore, cannot be accepted in its face value. Evidence of defence witness No.1, Somabhai Abhesinh, also cannot be believed and relied without corroboration as is a highly interested witness, therefore, such evidence must get independent corroboration from cogent and concrete evidence. Insanity being a highly technical subject the Court should not rely upon layman's opinion but should only rely upon the opinion of experts, that is, doctor one who is conversant with it. The testimony of defence witness No.1, father of the accused, also cannot be accepted for the reason that he does not inspire confidence. In his testimony he says that owing to insanity the wife of accused has given him divorce. But, P.W.9, Chhatrasinh Dahyabhai, Ex.29, when faced with such suggestion by defence has categorically stated that the accused has deserted his wife. Even assuming for the sake of argument that the accused was suffering from temporary phase of insanity then the temporary phase must be present at the relevant time of occurrence. This must be substantiated and corroborated by the circumstances immediately preceding, prevailing at that time and succeeding the occurrence. In this case the defence has utterly failed to point out such circumstances which may help the Court to infer temporary phase of insanity. Heavy reliance is placed by Mr. Pandya on the oral testimony of defence witness No.1 who says that in the year 1985 the accused was taken to Maroli hospital for treatment. Reliance is also placed on Ex.1, a certificate issued by the Assistant Professor of Psychiatry, S.S.G. Hospital and Medical College, Baroda, dated 8.9.1987 when accused was in judicial custody certifying temporary insanity as on that date. We do not dispute and accept the evidence in its face value. But such evidence in no way can help the Court to arrive at or infer temporary insanity on the date of occurrence because the incident occurred on 26.3.1986. Even if the statement about temporary insanity is true then the temporary phase of insanity was more than a year prior and more than a year after the occurrence. In no way it would be helpful to infer temporary insanity or periodical insanity at the time of occurrence especially when it is evident from record that he could come out of temporary phase with treatment for a short period.

It is true that expert opinion may not be available about insanity and state of mental health at the time of incident. But such insanity can very well be inferred from the intervening circumstances prevailing within the

reasonable time, that is, preceding and succeeding the incident. The circumstances must prevail within reasonable time and have to be brought on record. But in this case no such intervening circumstance immediately preceding and succeeding the incident have been brought on record. What is sought to be brought on record is the state of mental health prevailed 1 1/2 years prior and 1 1/2 years after the incident and that too also without any documentary support and shall be deemed to have failed to discharge burden. Therefore, in our view, this cannot support the case of defence and, therefore, the observation made by the Supreme Court in Dahyabhai's case (supra) while discussing the applicability of Section 84 of IPC will be of no help to the defence.

In the background of foregoing discussion, we hold that the prosecution has successfully proved the charges levelled against the accused and his implicity in commission of offence and, therefore, the learned trial Judge has rightly convicted the accused for the offences charged. As a cardinal rule, when the defence relies upon any of the exception under criminal law, the burden lies upon defence as contemplated under Section 105 of the Indian Evidence Act. In this case, as discussed above, the defence has failed to discharge the burden of proving periodical or temporary insanity at the time of occurrence. Therefore, the defence of temporary insanity is not tenable in law.

In view of this fact, the appeal is devoid of merits and is hereby dismissed, confirming the order of conviction and sentence passed by the learned trial Judge.